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IN THE
COURT OF APPEALS OF INDIANA

G.A.T.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 71A04-0509-JV-509
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable Barbara J. Johnston, Magistrate
Cause No. 71J01-0503-JD-188

August 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

G.A.T. appeals from his adjudication as a delinquent child for committing two counts of child molesting[1] which would have been Class C felonies when committed by an adult, three counts of child molesting[2] which would have been Class B felonies when committed by an adult, and one count of resisting law enforcement[3] which would have been a Class A misdemeanor when committed by an adult. He raises two issues, which we restate as:

I. Whether his adjudications on the two counts of child molesting as Class C felonies when committed by an adult violate double jeopardy; and

II. Whether sufficient evidence was presented to support his adjudication for resisting law enforcement.

We affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

In 2000, five-year-old P.R. and her three-year-old sister K.R. were placed in Margaret Townsend's home as foster children. About a year later, Townsend adopted both girls. Townsend also had several biological children living in her home, including G.A.T. who was approximately seven years older than P.R. After P.R. and K.R. were placed in Townsend's home, G.A.T. molested both of them on several different occasions. P.R. told Townsend about this in February of 2005. In March of 2005, P.R. told her school social worker that G.A.T. had been molesting her. After this disclosure, both P.R. and K.R. were interviewed at the Child Advocacy Center in South Bend.

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[1] *See* IC 35-42-4-3(b).

[2] *See* IC 35-42-4-3(a).

[3] *See* IC 35-44-3-3(a).

G.A.T. molested P.R. at least five times. The first time occurred when P.R. was seven years old. In that instance, G.A.T. put his "private part" in P.R.'s mouth and moved her head back and forth with his hands. *Tr*. at 125-26. On another occasion, when P.R. was eight years old, G.A.T. came into the room that P.R. and K.R. shared. He put his "private part" in K.R.'s "behind" and in her mouth. *Tr*. at 149-50. G.A.T. also put his "private part" in P.R.'s mouth and in her "behind." *Id*. G.A.T. molested P.R. several additional times by placing his "private part" in her mouth and in her "behind." He also molested K.R. on several different occasions by touching the outside of her "butt" with his "private part" and by placing his "private part" in her mouth. *Id*. at 203, 205-06.

After notifying Townsend about the girls' allegations, the police told her that they needed to speak with G.A.T. On March 16, 2005, Townsend brought G.A.T. to the Family Violence Unit to speak with St. Joseph County Police Detective Dean Francis ("Detective Francis"). Detective Francis was wearing a dress shirt and slacks with his badge on the front of his belt and his gun on his right hip and introduced himself to G.A.T. as a detective. Detective Francis took G.A.T. into an interview room and left him inside with the door closed and locked. He then took Townsend to another interview room to speak with her about the allegations made by P.R. and K.R.

Sergeant Harry Seider,[4] an investigator for the Family Violence Unit, Special Victims, was in a nearby room when he heard someone knocking in one of the interview rooms. Sergeant Seider went to the room to find out why the person was knocking. He was wearing

[4] Sergeant Seider's name is spelled "Sieder" in the transcript. However, we use the spelling used in the delinquency petition.

a casual shirt and pants, with a gun on his left hip and a badge attached to his belt on the right side. When Sergeant Seider got to the interview room, he saw a black male, who he later learned to be G.A.T., knocking on the door. G.A.T. asked Sergeant Seider for some water, and after he gave G.A.T. a glass of water, Sergeant Seider shut and locked the interview room door just as he had found it. Shortly thereafter, Sergeant Seider again heard G.A.T. knocking in the interview room. He returned, and G.A.T. repeatedly told Sergeant Seider that he wanted to leave. Sergeant Seider told G.A.T. that he could not release G.A.T. from the room. This was because Sergeant Seider was not working on G.A.T.'s case and did not know why G.A.T. had been placed in the interview room. G.A.T. then quickly rushed at Sergeant Seider, placing his hands on Sergeant Seider's upper body and attempting to push him out of the door. Sergeant Seider attempted to push G.A.T. back into the room and a scuffle ensued. During this scuffle, the two knocked into a desk and chair inside the interview room, and eventually G.A.T. pushed Sergeant Seider into the hallway, where the two fell onto the floor. Sergeant Seider then held G.A.T. until he could calm down, but G.A.T. continued to struggle to get away. After approximately five to ten minutes, G.A.T. calmed down and allowed the officers to handcuff him.

The State filed a delinquency petition alleging that G.A.T. committed two counts of child molesting, which would be Class C felonies if committed by an adult, three counts of child molesting, which would be Class B felonies if committed by an adult, and one count of resisting law enforcement, which would be a Class A misdemeanor if committed by an adult. A fact finding hearing was held, and on July 5, 2005, the juvenile court found G.A.T. to be

delinquent and entered true findings on all of the counts. After a dispositional hearing, G.A.T. was ordered to be placed in the Department of Correction. He now appeals.

DISCUSSION AND DECISION

I. Double Jeopardy

Article 1, section 14 of the Indiana Constitution states that "[n]o person shall be put in jeopardy twice for the same offense." Double jeopardy analysis requires the dual inquiries of the "statutory elements test" and the "actual evidence test." *Davis v. State*, 770 N.E.2d 319, 323 (Ind. 2002). G.A.T. does not argue the statutory elements test. The actual evidence test prohibits multiple convictions if there is a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish one or more of the essential elements of a second challenged offense. *Alexander v. State*, 768 N.E.2d 971, 974 (Ind. Ct. App. 2002), *aff'd on reh'g*, 772 N.E.2d 476, 478 (Ind. Ct. App. 2002), *trans. denied*.

G.A.T. argues that his adjudications for two counts of child molesting as Class C felonies violate the protections against double jeopardy. Under these counts, the State had the burden to prove that G.A.T. did perform or submit to fondling or touching with P.R. and K.R. with the intent to arouse or satisfy his sexual desires. IC 35-42-4-3(b). He contends that the evidence of fondling and touching that was presented to prove these adjudications was the same evidence used to prove the three counts of child molesting as Class B felonies.

Under IC 35-42-4-3(a), in order to make a true finding as to the three counts of child molesting as Class B felonies, the State was required to prove that G.A.T. did perform or submit to deviate sexual conduct with P.R. and K.R. with the intent to arouse or satisfy his

sexual desires. "Deviate sexual conduct" means an act involving a sex organ of one person and the mouth or anus of another person. IC 35-41-1-9. G.A.T. claims that there was no evidence that he fondled or touched either P.R. or K.R. in any way other than oral to genital contact, so the same evidence used to prove that he engaged in deviate sexual conduct with the girls was used to prove that he fondled or touched them.

At G.A.T.'s disposition hearing, his attorney moved that the two counts of child molesting that dealt with fondling or touching should be merged with the remaining child molesting counts. At that time, the State and the juvenile court were both in agreement with the motion. However, the juvenile court failed to grant the motion and merge the offenses without any explanation. We conclude that the agreement of all parties and the juvenile court at the disposition hearing that the two fondling counts should have been merged with the remaining counts is sufficient evidence that there was no doubt that the same evidence was used to prove the elements of both the fondling counts and the deviate sexual conduct counts. We therefore vacate the true findings for two counts of child molesting which would have been Class C felonies if committed by an adult.

II. Sufficiency of the Evidence

"When the State seeks to have a juvenile adjudicated a delinquent, it must prove every element of the offense beyond a reasonable doubt." *D.B. v. State*, 842 N.E.2d 399, 400 (Ind. Ct. App. 2006) (citing *C.T.S. v. State*, 781 N.E.2d 1193, 1200-01 (Ind. Ct. App. 2003), *trans. denied*). On review, we apply the same sufficiency standard as in criminal cases. *J.D. v. State*, 841 N.E.2d 204, 206 (Ind. Ct. App. 2006). When reviewing a claim of insufficient evidence, we will not reweigh the evidence or judge the credibility of the witnesses. *Id*. We

look to the evidence and the reasonable inferences therefrom that support the true finding. *D.B.*, 842 N.E.2d at 401. "We will affirm the adjudication if evidence of probative value exists from which the fact finder could find the juvenile guilty beyond a reasonable doubt." *Id*. at 401-02.

G.A.T. argues that the State failed to present sufficient evidence to support his true finding for resisting law enforcement. To support a true finding for resisting law enforcement, the State was required to prove that G.A.T. knowingly or intentionally forcibly resisted, obstructed, or interfered with a law enforcement officer who was lawfully engaged in the execution of his duties as an officer. IC 35-44-3-3(a)(1). G.A.T. specifically contends that there was insufficient evidence to prove that he forcibly resisted Sergeant Seider.

"A person 'forcibly resists' law enforcement when he or she uses strong, powerful, violent means to evade a law enforcement official's rightful exercise of his or her duties; such means include the making of threatening gestures toward the official." *Shoultz v. State*, 735 N.E.2d 818, 822-23 (Ind. Ct. App. 2000), *trans. denied*. Here, G.A.T. initiated a physical confrontation with Sergeant Seider by coming quickly toward him and placing his hands on Sergeant Seider's upper body in an attempt to push his way out of the room. This physical confrontation by G.A.T. was done without any justification. G.A.T. then continued to struggle with Sergeant Seider, knocking into furniture, and pushing Sergeant Seider back out of the interview room, where they both fell onto the floor of the hallway. G.A.T. continued to struggle for five to ten minutes until Sergeant Seider was able to handcuff him. The evidence showed that G.A.T. used strong, powerful, violent means in his struggle with Sergeant Seider. While not condoning the unexplained holding of G.A.T. in a locked

interview room, we conclude that the evidence was sufficient to support G.A.T.'s true finding for resisting law enforcement.

Affirmed in part and reversed in part.

BAILEY, J., and CRONE, J., concur.